

SUPERIOR COURT
OF THE
STATE OF DELAWARE

WILLIAM C. CARPENTER, JR.
JUDGE

NEW CASTLE COUNTY COURTHOUSE
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December 15, 2010

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RE: State v. Paul Weber
ID No. 0408022175

_____ On Defendant's Motion to Enforce Plea Agreement - DENIED
On Defendant's Motion for Merger of Sentence - DENIED

Submitted: November 19, 2010
Decided: December 15, 2010

Dear Counsel:

Before this Court is Defendant's Motion to Enforce Plea Agreement and/or Motion for Merger of Sentence. For the reasons set forth below, the Motions will be denied.

a. Motion to Enforce Plea Agreement

The defendant seeks to enforce the original plea offer made to him by the State. This plea agreement would have required the defendant to plea guilty to Attempted Robbery Second and the State would recommend a sentence of five years at level five. In response, the defendant requested the State to agree that he was entitled to credit time of approximately two years. The State refused to agree,

and the original offer was rejected. A few days later, in response to defendant's credit time request, the State modified its offer and agreed that the defendant could receive the credit time but in doing so would increase its Level 5 recommendation to seven years. This would ensure the defendant would serve the five years the State was seeking. The defendant rejected the modified offer and the case proceeded to trial.

The Court will not enforce the original plea offer made by the State. First, as a general matter, a defendant has "no legal entitlement to a plea bargain."¹ Thus, the State has no obligation to provide him with one. A plea agreement is "undertaken for mutual advantage and governed by contract principles."² Acceptance of an offer is required for the formation of an enforceable contract.³ A defendant's rejection of the State's offer ordinarily terminates the defendant's right to accept the offer.⁴ A defendant has "no right to require the prosecutor to re-offer a plea which was rejected by the defendant."⁵

Nothing in this case suggests that Defendant and the State ever reached an actual agreement with respect to the terms of Defendant's plea. It appears that the State originally offered a plea that included a recommendation of five years, but Defendant would only accept the offer if the State agreed that he was entitled to two years of credit time. The State rejected this proposal but modified its offer with a seven year recommendation with no objection to the credit time. The defendant rejected this offer and the case proceeded to trial. Defendant now claims that he would have accepted the State's offer of five years at level five and that the State unfairly revised its offer to seven years because of the application of credit time. However, there is no evidence in the record to suggest that there was a "meeting of the minds" sufficient to establish an enforceable contract. Accordingly, Defendant cannot show that he has a contractual right to the enforcement of the State's plea offer.

In his reply brief, Defendant further argues that he was unfairly prejudiced by the State's withdrawal of the five-year plea offer because he had intended to accept that offer and accordingly did not subpoena witnesses to testify on his behalf at trial. This argument is also without merit. A defendant and his counsel have an obligation to prepare adequately for trial. Even where the defendant and the state have agreed on the terms of a plea bargain, such agreement is not final

¹ *Washington v. State*, 844 A.2d 293, 294 (Del. 2004).

² *Id.* at 295 (citing *State v. Williams*, 648 A.2d 1148, 1151 (N.J.App.Div. 1994)).

³ See, e.g., *White Rock Construction, Inc. v. 421 Market, LLC*, 2010 WL 2889028, *7 (Del. Super. 2010).

⁴ *Id.* (quoting *Williams* at 1151-52).

⁵ *Id.*

unless and until it has been accepted by the Court. Accordingly, neither the existence of a valid plea agreement nor the defendant's intent to accept a plea offer relieves a defendant of his obligation to prepare for trial. In addition, the transcript of the trial fails to reflect any request for a continuance based on the failure to subpoena witnesses.

b. Defendant's Selective Prosecution Claim

Defendant has also moved for a merger of sentence. He first asserts that he is the subject of a selective prosecution because the "State rarely, if ever, proceeds with dual prosecutions for both carjacking and robbery."⁶ To prove selective or discriminatory prosecution, a defendant must establish:

at least *prima facie*, (1) that, while others similarly situated have not generally been proceeded against because of conduct of the type forming the basis of the charge against him, he has been singled out for prosecution, and (2) that the government's discriminatory selection of him for prosecution has been invidious or in bad faith, i.e., based upon such impermissible considerations as race, religion, or the desire to prevent his exercise of constitutional rights.⁷

A defendant must be able to show "intentional and purposeful discrimination. Mere conscious exercise of some selectivity in enforcement is not in itself a federal constitutional violation."⁸ As the Delaware Supreme Court elaborated, "The defendant must, by producing some credible evidence, make a threshold showing of a 'colorable basis' for [...] [a] defense of selective/discriminatory prosecution before an evidentiary hearing will be accorded on this issue."⁹

Defendant has not provided sufficient evidence to make a threshold showing of a "colorable basis" for discriminatory prosecution. Defendant's claim that the offenses of carjacking and robberies are rarely prosecuted together is not enough to support a claim of selective prosecution. Moreover, even if the Court was to assume that the defendant could satisfy the first prong by showing that he has received different treatment than others who have committed the same offenses, he still has not satisfied the second prong of the test. Defendant here has made no allegation that "the government's discriminatory selection of him for prosecution" has been made upon any impermissible consideration such as race, religion, or exercise of constitutional rights. Accordingly, the Court finds Defendant's claim

⁶ Def's Mot. at ¶5.

⁷ *State v. Holloway*, 460 A.2d 976, 978 (Del. Super. 1983).

⁸ *State v. Wharton*, 1991 WL 138417, *5 (Del. 1991).

⁹ *Id.* at *7.

of selective prosecution to be without merit.

c. Motion for Merger of Sentence

Defendant next argues that the offenses of attempted carjacking first degree and attempted robbery first degree do not “involve fundamentally different elements of proof” and the charges should merge for purposes of sentencing before this Court. A defendant may be prosecuted for both carjacking and a related felony without violating double jeopardy.¹⁰ The Delaware Supreme Court noted that the carjacking statute expressly stated that “[n]othing in this section shall be deemed to preclude prosecution under any other provision of this Code.”¹¹ Thus, the Court found that imposing separate sentences for theft and carjacking was not constitutionally barred because the legislature’s intent to create separate offenses was clear.¹² Accordingly, this Court finds Defendant’s claim that the prosecutions for attempted carjacking first degree and attempted robbery first degree to be without merit.

Based upon the above reasoning, Defendant’s Motion to Enforce Plea Agreement and Motion for Merger of Sentence are hereby DENIED.

IT IS SO ORDERED.

/s/ William C. Carpenter, Jr.

Judge William C. Carpenter, Jr.

¹⁰ See *Lewis v. State*, 2005 WL 2414293 (Del. 2005).

¹¹ *Id.* at *3.

¹² *Id.*